

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 31 of 2000****For Approval and Signature:****HONOURABLE MR.JUSTICE R.P.DHOLAKIA :****HONOURABLE MR.JUSTICE KS JHAVERI :**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VISHWESHRAJ @ GULAB BHURJI CONVICT 75484 - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :

THROUGH JAIL for Appellant(s) : 1, MRS SHILPA R SHAH for Appellant(s) : 1,
MR HL JANI APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 11/12/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.0 This appeal is directed against the judgment and order dated 31.12.1999 passed in Sessions Case No. 78 of 1999 by the learned Addl. Sessions Judge, Surat whereby, the appellant was convicted for offences punishable u/s. 302 and 323 of the Indian Penal Code [for short, "the I.P.C."] and Section 135 of the Bombay Police Act [for short, "the B.P. Act"]. For conviction u/s. 302 of the I.P.C., the appellant was sentenced to undergo Rigorous Imprisonment for Life with fine of Rs.2000/- and in default of payment of fine, Simple Imprisonment for a further period of Six Months. For conviction u/s. 323 of the I.P.C., the appellant was sentenced to undergo Rigorous Imprisonment for Three Months with fine of Rs.300/- and in default of payment of fine, Simple Imprisonment for a further period of Fifteen Days. No separate sentence was imposed for offence punishable u/s. 135 of the B.P. Act. Both the sentences were ordered to run concurrently. The appellant was given the benefit of set-off.

2.0 The brief facts of the prosecution case are as under;

2.1 On 18.07.1997 at around 1130 hrs. while the complainant – Rajiben, her husband – Manubhai Karamsinh Waghri and their son – Govind were at their home, the wife of the appellant – Gitaben came to their house and requested to provide her with some food. While the complainant was taking food, the husband of said Gitaben – the appellant herein, came to their house and requested to provide him also with some food. Both the appellant and his wife – Gitaben were provided with food by the complainant. After consuming the same, the appellant and his wife left for their house.

2.2 Some time later, the husband of the complainant - Manubhai heard shouts of some quarrel going on between the appellant and his wife. Therefore, he went to their house and tried to settle the same. At that time, the appellant hurled abuses at him and when Manubhai told him not to use such abusive language, the appellant got enraged and

he took a bamboo stick lying in his house and, thereafter, hit a bamboo stick blow on the head of Manubhai.

2.3 As a result thereof, Manubhai suffered serious injury and started bleeding profusely. The complainant and son – Govind tried to rescue Manubhai. However, at that time, the complainant and her son also sustained injuries on account of the haphazard flashing of the bamboo stick by the appellant. Therefore, the complainant shouted for help and by that time the appellant fled the place of incident. Manubhai tried to follow the appellant. However, after walking some distance, Manubhai fell down and when the complainant reached at the said place, she noticed that Manubhai had become unconscious and that he was bleeding profusely from the head. Therefore, she sent her son - Govind to the Police Station. Some time later, the police authorities of Sachin Police Station arrived at the place of incident.

2.4 Thereafter, the complainant along with few other persons took Manubhai to New Civil Hospital, Surat for

necessary treatment. However, on examination, Manubhai was declared 'dead'. A complaint to that effect was recorded by P.S.I. - one Mr. Sadhu of Sachin Police Station and the same was registered as I – C. R. No. 82 of 1998 for offences punishable u/s. 302 and 323 of the I.P.C. and Section 135 of the B.P. Act.

2.5 The P.S.I. carried out inquest '*panchnama*' in the presence of '*panchas*' and, thereafter, handed over further investigation into the alleged offence to P.S.I. - Mr. B. K. Dodiya. The Investigating Officer went to the scene of offence and performed '*panchnama*' of the scene of offence and also collected necessary '*muddammal*' articles. In the meantime, the dead body of deceased – Manubhai was also sent for post-mortem. The '*muddamal*' articles so collected were sent to F.S.L. for examination. On receipt of the F.S.L. Report, PM note and other Reports, they were kept in the investigation file.

2.6 Further investigation was carried out and statements of several witnesses were recorded. As cogent

evidence was found against the appellant, he was arrested on the same day. Arrest '*panchnama*' was prepared, after completing necessary formalities. The clothes worn by the appellant was also seized by way of a separate '*panchnama*'. A complaint with respect to the said incident was also filed by the appellant as the appellant had also sustained injuries during that scuffle. During the course of interrogation, as the appellant showed his willingness to produce the weapon used in the commission of the alleged offence in question, the same was recovered by way of a separate '*panchnama*' in the presence of '*panchas*'. Thereafter, the appellant, complainant and her son – Govind were sent to the Hospital for necessary treatment.

2.7 On completion of investigation, charge-sheet was filed against the accused in the Court of learned Judicial Magistrate, First Class, Surat. As the case was exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, Surat committed the case to the District & Sessions Court, Surat and the same was numbered as Sessions Case No. 78 of 1999. The matter was

transferred to the learned Addl. Sessions Judge for disposal on merits. On production of the accused person, the learned Addl. Sessions Judge framed the charge and as he pleaded not guilty to the said charges, trial was conducted against him.

3.0 The prove the guilt against the appellant, the prosecution had examined in all seventeen witnesses namely, PW – 1 Hafizudin Abdul Majid Saiyed at Exhibit – 12, PW – 2 Pannalal Jhagaduram Yadav at Exhibit – 14, PW – 3 Bherubhai Bhakabhai Bharwad at Exhibit – 16, PW – 4 Abdul Hamid Rekh at Exhibit – 18, PW – 5 Dr. Krishnadutt Harishankar Chawla at Exhibit – 22, PW – 6 Rajiben Manubhai Vaghri at Exhibit – 24, PW – 7 Sidiq Nazir Kureshi at Exhibit – 26, PW – 8 Ramamurthy Bachairam Bharti at Exhibit – 27, PW – 9 Vikas Pareshbhai Dhara at Exhibit – 28, PW – 10 Minaben Muljibhai Chunilal Vasava at Exhibit – 29, PW – 11 Gitaben Vishweshwar Rao @ Gulab at Exhibit – 30, PW – 12 Dr. Amit Nathabhai Nabhor at Exhibit – 32, PW – 13 Hemantbhai Ashok Barot at Exhibit – 35, PW – 14 Govind Mantubhai Vaghri at Exhibit – 36, PW – 15

Jethalal Kuvarji Gosar at Exhibit – 39, PW – 16
Bhagwatsinh Kesarisinh Dodiya at Exhibit – 40 and PW – 17
Suryalal Mohanbhai Sadhu at Exhibit – 43.

3.1 The prosecution had also relied upon several documentary evidence, more particularly, the evidence in the form of complaint at Exhibit – 25, the '*Panchnama*' of the scene of offence at Exhibit – 17, the PM note at Exhibit – 23, the Inquest '*panchnama*' at Exhibit – 10, the Arrest '*panchnama*' at Exhibit – 13, the discovery '*panchnama*' at Exhibit – 15 and the F.S.L. Report at Exhibit – 41.

3.2 On submission of the closing '*purshis*', the further statement of the appellant was recorded u/s. 313 of the Code of Criminal Procedure, 1973. After hearing learned counsel for the respective parties, the learned Addl. Sessions Judge passed the impugned judgment and order convicting the appellant and imposing sentence as stated in the earlier part of this judgment. Hence, the present appeal.

4.0 Mrs. Shilpa R. Shah learned Advocate for the

appellant has submitted that it is true that the deceased died on account of the infliction of a bamboo stick blow on the head by the appellant. She has, however, contented that the said incident has occurred out of sudden provocation and that there was no intention / motive behind the same. Hence, at the most, the appellant could be convicted for the offence punishable u/s. 304-II and not u/s. 302 of the I.P.C.. Therefore, the impugned judgment passed by the Court below deserves to be modified to the said extent.

4.1 Learned Advocate for the appellant has submitted that since the appellant has already undergone more than nine years of imprisonment and considering the circumstances under which the said offence has taken place, by taking a lenient view, the appellant may be released from the custody on the ground that the sentence already undergone by the appellant is the sufficient sentence.

5.0 Mr. H. L. Jani learned APP has submitted that from the evidence led by PW – 6 Rajiben Manubhai Vaghri at

Exhibit – 24, PW – 11 Gitaben Vishweshwar Rao @ Gulab at Exhibit – 30 and PW – 14 Govind Mantubhai Vaghri at Exhibit – 36, it is established that they are eye-witnesses to the incident in question. Their presence at the scene of offence, at the relevant point of time, was natural and since the incident took place in broad day-light, there shall not be any question of mis-identification also. Hence, this is a fit case where the guilt of the appellant has been proved beyond doubt. Therefore, no interference is required by this Court in this appeal.

6.0 Heard learned counsel for the respective parties and perused the entire oral as well as documentary evidence on record. For the purpose of deciding this appeal, we find the evidence led by the three witnesses, viz. PW – 6 Rajiben Manubhai Vaghri at Exhibit – 24, PW – 11 Gitaben Vishweshwar Rao @ Gulab at Exhibit – 30 and PW – 14 Govind Mantubhai Vaghri at Exhibit – 36 are important as the entire case of the prosecution mainly rests upon their evidence.

7.0 PW – 6 Rajiben Manubhai Vaghri at Exhibit – 24 is the wife of the deceased as also the complainant in this case. In her deposition, she has stated that on the date of the incident in question, at around 1130 hrs., the appellant who was residing in their neighborhood, came to their hut and asked for some food. During that time, the deceased was also present in the hut. As she had already cooked rice by that time, she gave some rice and a mixture of cooked chilly to the appellant. The appellant went to his hut with it and thereafter returned to the hut of the deceased and asked for '*rotla*' [a cereal based food]. The deceased informed him that the same shall be prepared in the evening and that he could collect it at that time. On hearing this, the appellant hurled abuses at the deceased. Thereafter, the appellant went to his hut and brought a bamboo stick, with which he hit a blow on the head of the deceased. As a result of that the deceased started bleeding profusely and after walking some distance, he fell down at a nearby place. She has further deposed that when she went towards the deceased, the appellant also inflicted a bamboo stick blow on her left hand and, thereafter, the appellant fled the place

of incident. She has further deposed that when the aforesaid incident had taken place, her son – Govind [PW – 14 at Exhibit – 36] was present in the house.

7.1 This witness has been cross-examined at length in the Court below. Some minor contradictions come on record when we compare her evidence before the Court below with the averments made by her in the complaint filed at Exhibit – 25. However, nothing incriminating has come out from her cross-examination.

8.0 PW – 11 Gitaben Vishweshwar Rao @ Gulab at Exhibit – 30 is the wife of the appellant. In her deposition, she has stated that on the date of the incident while the appellant was having lunch, at that time, Minaben Muljibhai Chunilal Vasava [PW – 10 at Exhibit – 29] had come and quarreled with them. During that process, Minaben gave a stone blow on the appellant and went away. Thereafter, said Minaben returned to the house of the appellant along with the deceased and his wife Rajiben Manubhai Vaghri [PW – 6 at Exhibit – 24]. She has further deposed that the deceased

had inflicted a bamboo stick blow on her as a result of which a fight had taken place between the deceased and the appellant.

8.1 This witness has categorically deposed that she had noticed the appellant inflicting a bamboo blow on the deceased on account of which the deceased had expired on the spot. This witness has also been cross-examined at length in the Court below. However, nothing incriminating has come out from her cross-examination which may lead us to believe her evidence to be untrue or unreliable.

9.0 PW – 14 Govind Mantubhai Vaghri at Exhibit – 36 is the son of the deceased. This witness has also narrated the same facts as has been narrated by her mother – Rajiben Manubhai Vaghri as PW – 6 at Exhibit – 24. This witness has also been cross-examined at length in the Court below but, nothing contrary has come out from her cross-examination, which may lead us to believe her evidence to be untrue or unreliable.

10.0 From the depositions of the aforesaid three witnesses, viz. PW – 6 Rajiben Manubhai Vaghri at Exhibit – 24, PW – 11 Gitaben Vishweshwar Rao @ Gulab at Exhibit – 30 and PW – 14 Govind Mantubhai Vaghri at Exhibit – 36, one fact which stands apart is that the appellant had inflicted a bamboo stick blow on the head of the deceased which, ultimately, resulted to the death of the deceased. It is true that the complainant has not deposed as per the averments made by her in the complaint at Exhibit – 25 and that there are some minor contradictions here and there. But, on material point, i.e. with respect to the alleged infliction of a bamboo stick blow on the head of the deceased, the evidence led by her is consistent. The evidence led by this witness also gets support from the evidence of PW – 11 Gitaben Vishweshwar Rao @ Gulab at Exhibit – 30 and PW – 14 Govind Mantubhai Vaghri at Exhibit – 36. Thus, it could be concluded without any doubt that the appellant had inflicted a bamboo stick blow on the head of the deceased.

11.0 The aforesaid evidence led by the said three

witnesses can be fully relied upon since their presence at the scene of offence, at the relevant point of point, is found to be natural. Further more, as the incident in question took place in broad day-light, there shall not be any question of mis-identification. Apart from that it has also come on record that the huts of the deceased and the appellant were situated adjacent to each other at the time when the incident in question took place. Thus, keeping in mind the aforesaid facts, it could be concluded that the aforesaid three witnesses are eye-witnesses to the alleged incident in question.

12.0 Apart from the above, the PM note of the deceased at Exhibit – 23, the Inquest '*panchnama*' at Exhibit – 10, the Injury Certificate of the appellant at Exhibit – 33 and the Injruy Certificate of Rajiben Manubhai Vaghri at Exhibit – 34 also support the case of the prosecution. The evidence led by the Medical Officer – Dr. Krishnadutt Harishankar Chawla, who has been examined as PW – 5 at Exhibit – 22, also supports the case of the prosecution. In his deposition, the Medical Officer has categorically deposed that all the

injuries were ante-mortem and that they could be possible by the hit of the '*muddamal*' bamboo stick. Thus, it is established beyond doubt that on account of the hit of the bamboo stick on the head, the deceased has expired. Hence, we have no hesitation in holding that the deceased died a homicidal death.

13.0 It is a matter of record that the appellant had also sustained injuries in the scuffle that took place between him and the deceased, which is evident from the Injury Certificate at Exhibit – 33. No motive, which is an essential ingredient behind any criminal act, appears to be in existence from the entire material available on record, including the evidence led by the wife of the deceased – Rajiben Manubhai Vaghri as PW – 6 at Exhibit – 24, the complaint at Exhibit – 25 and the son of the deceased – Govind Mantubhai Vaghri as PW – 14 at Exhibit – 36. Thus, it appears that the death of the deceased was not a 'murder' but, was the result of a free-fight which took place out of sudden provocation / anger.

13.1 If the appellant was having any intention / motive to kill the deceased, then the appellant would have definitely made some prior arrangements to carry out his act. But, the fact that the deceased died on account of the infliction of a bamboo stick blow on the head, which was used by the appellant during the course of the scuffle by searching out the same, clearly leads us to believe that the appellant had no motive / intention to kill the deceased. Keeping in mind the aforesaid aspects, we believe that the alleged act of the appellant does not under the provision of Section 302 of the I.P.C. but, essentially falls under the provisions of Section 304-II of the I.P.C.

14.0 The jail record of the appellant shows that he has already undergone imprisonment for more than Nine Years. In that view of the matter and considering the facts and circumstances of the case, we are of the opinion that ends of justice would be met if the sentence already undergone by the appellant is held to be the sufficient sentence.

15.0 In the result, the appeal is partly allowed. The

impugned judgment and order dated 31.12.1999 passed by the learned Addl. Sessions Judge, Surat in Sessions Case No. 78 of 1999 is modified and the sentence already undergone by the appellant is ordered to be treated as the sufficient sentence. The appellant is, therefore, ordered to be set at liberty forthwith, if not required in any other offence.

[R. P. DHOLAKIA, J.] [K. S. JHAVERI, J.]

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